

APPELLATE CIVIL

*Before Gopal Singh, J.*RAGHBIR SINGH,—*Petitioner.**versus.*SAT PAL KAUR,—*Respondent.***First Appeal From the Order No. 35-M of 1966.**

April 5, 1972.

Hindu Marriage Act (XXV of 1955 as amended by Act No. XLIV of 1964)—Section 13—Wife obtaining a decree for judicial separation before the amendment of section 13—Husband filing petition for divorce under section 13(1A) as amended—Such petition—Whether maintainable—Section 13(1A)—Whether retrospective.

Held, that prior to the amendment of section 13 of the Hindu Marriage Act, 1955, only that spouse, in whose favour decree for judicial separation had been granted, was entitled to maintain petition under section 13 for dissolution of marriage by divorce but not the other spouse. By virtue of amendment of the Act in 1964 which added sub-section (1A) to section 13, either spouse, whether decree for judicial separation has been granted in favour of one or the other, has been given the right to file petition for divorce. However, if a decree for judicial separation was passed in favour of a spouse prior to the amendment, cause of action for the right to file a petition for divorce arose from the date of that decree. Once cause of action for the right to file a petition arose in favour of the spouse only to whom the decree had been granted, the other spouse was under disability to avail of that right. The amendment, intervening the continuity of cause of action vesting that right in one spouse and denying it to the other, has not conferred that right on the spouse to whom it had been denied prior to the amendment. Both the right inhering in one spouse and the corresponding disability from which the other spouse suffered having arisen and been entailed prior to the date of amendment, the amendment cannot adversely affect that right or remove corresponding disability unless the amendment is retrospective in operation either by express provision to that effect or by necessary implication or intendment. There is neither any express provision nor any implied indication in section 13 as amended to show that in its application the amendment is retrospective so as to additionally confer that right which is substantive in nature on a spouse who by virtue of the pre-amendment provision stood divested or deprived of it. Hence a husband cannot maintain a petition for dissolution of marriage by divorce by virtue of section 13(1A) on the ground that he was a party to the decree for judicial separation obtained by his wife prior to the amendment.

Ragbhir Singh v. Satpal Kaur (Gopal Singh, J.)

Appeal from the order of the court of Shri A. D. Koshal, District Judge, Amritsar dated 31st January, 1966, dismissing the petition of the appellant and leaving the parties to bear their own costs.

Harbans Singh Gujral and Gurcharan Singh Gandhi, Advocates, for the appellant.

K. T. S. Tulsi, Advocate, for the respondent.

JUDGMENT

GOPAL SINGH, J.—This is appeal by Ragbhir Singh against his wife, Shrimati Satpal Kaur. It is directed against the judgment of the District Judge, Amritsar dated January 31, 1966 dismissing petition under section 13 of the Hindu Marriage Act, 1955 (hereinafter called the Act) for dissolution of marriage filed by the husband against the wife.

(2) The parties were married at Amritsar on June 22, 1948. After marriage both of them lived together in village Roopowali, district Amritsar, where the husband resided. They amicably lived together up to 1957. In that year, the husband re-married. The wife left the husband and started staying with her parents at Amritsar. In 1957, the wife filed petition for judicial separation under section 10 of the Act on the ground that the husband had re-married and deserted her. The husband was served in that petition. In spite of service, he did not appear in Court. The petition was allowed *ex parte* and the relief of judicial separation sought for by the wife against the husband was decreed on July 9, 1958.

(3) In 1961, the wife filed a complaint against the husband under section 494, Indian Penal Code on the ground that he had committed offence of re-marriage during the life time of his previous wife. The husband was convicted and sentenced for offence of bigamy. After the filing of that complaint, the wife filed an application under section 488, Code of Criminal Procedure claiming maintenance allowance against the husband. That application was allowed on September 21, 1962 and she was granted maintenance allowance of Rs. 30 per mensem. The husband did not pay the maintenance allowance in spite of processes for its recovery issued against him. He was fined.

(4) In 1962, the husband made a petition under section 13 of the Act praying for dissolution of his marriage with the wife. It was

dismissed on August 23, 1964. On December 22, 1964, section 13 of the Act was amended. Prior to the amendment, only a party, in whose favour a decree for judicial separation had been granted, could maintain a petition under that section. By that amendment, sub-section (1-A) was introduced and clauses (viii) and (ix) of sub-section (1) of section 13 of the Act were deleted. By virtue of this amendment, either of the spouse being a party to a decree for judicial separation could maintain petition under section 13.

(5) On August 26, 1965, the husband filed a petition against the wife under section 13(1-A) seeking relief for dissolution of marriage by divorce on the footing of decree for judicial separation dated July 9, 1958 obtained by the wife against the husband. In the written statement filed on behalf of the wife, she pleaded that the husband had resumed cohabitation with her against her wishes in the month of July 1965 and that the above referred to amendment enforced on December 22, 1964 did not operate retrospectively for the right to maintain a petition by the husband on the basis of a decree for judicial separation obtained by the wife long before the amendment became operative. She also pleaded that the husband was estopped by his acts and conduct from filing petition under section 13. The above pleadings between the parties gave rise to the following issues:—

- (1) Whether 1964 amendment of the Hindu Marriage Act has no retrospective effect?
- (2) Whether remedy of divorce is not open to the petitioner on the basis of decree for judicial separation passed in favour of the respondent?
- (3) Whether any previous decision between the parties operates as *res-judicata*?
- (4) Whether the petitioner is estopped by his acts and conduct from filing the present petition ?
- (5) Whether there is resumption of cohabitation between the parties after the passing of the decree for judicial separation ?
- (6) Whether the petition merits dismissal on the ground of delay ?

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(6) The trial Court on issues Nos. 1 and 2, interconnected as they are, held that sub-section (1-A) of section 13 of the Act as amended did not bar the petitioner from filing petition under section 13 of the Act. Issue No. 3 was determined against the wife on the ground that she had failed to produce certified copy of the judgment dated August 23, 1962 dismissing the earlier petition filed under section 13 of the Act on behalf of the husband against the wife. On issue No. 4, the Court came to the conclusion that by virtue of the provision of section 23(1)(a) of the Act, the wrongful act of husband of desertion of the wife, which led to the passing of decree for judicial separation on a petition filed by the wife against the husband disentitled the husband to claim the relief for dissolution of marriage by divorce. The finding given by the trial Court on issue No. 5 is to the effect that the evidence led in the case did not establish resumption of cohabitation by the husband with the wife. Under issue No. 6, the Court took the view that the husband was entitled to file petition under section 13 of the Act after the amendment in the form of sub-section (1-A) of the Act came into force and that petition having been filed on August 26, 1965 could not be held to be belated. All the issues except issue No. 4 were determined by the trial Court in favour of the husband. It is only decision on issue No. 4, which was given in favour of the wife and against the husband. As a result of decision on issue No. 4, the petition was dismissed. Hence the present appeal by the husband.

(7) Shri Harbans Singh Gujral, appearing on behalf of the appellant has contended that the view taken by the trial Court on issue No. 4 is untenable and deserves to be set aside.

(8) Shri K. T. S. Tulsi appearing on behalf of the wife has contended that the findings given by the trial Court on issues Nos. 1, 2 and 6 are unwarranted and be set aside. He also urged that the decision of the trial Court on issue No. 4 was not maintainable and liable to be set aside. Both the parties have confined their arguments to these issues and have not contested the findings given by the trial Court on issues Nos. 3 and 5.

(9) Now, I take up the question covered jointly by the two inter-linked issues Nos. 1 and 2 as to whether the petition filed on behalf of the husband under section 13 of the Act is maintainable by virtue of sub-section (1-A) of section 13 of the Act. That provision runs as follows:—

“13(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present

a petition for the dissolution of the marriage by a decree of divorce on the ground—

- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties.”

(10) Prior to the amendment of section 13 in relation to the right of a party to file petition the relevant provision as it stood is set out hereunder:—

“13(1) Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

- (viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against the party.”

(11) Prior to the amendment, which came into force on December 22, 1944, only that spouse, in whose favour decree for judicial separation had been granted, was entitled to maintain petition under section 13 of the Act for dissolution of marriage by divorce but not the other spouse. Thus, before the date the amendment as introduced by subsection (1-A) of section 13 became operative, the decree for judicial separation dated July 9, 1958 having been passed on the petition of wife in her favour, the husband had no *locus standi* to maintain petition under section 13 on the basis of that decree. It is only by virtue of amendment that either spouse, whether decree for judicial separation has been granted in favour of one or the other, has been given the right to file petition under section 13. If a decree for judicial separation had been passed in favour of a spouse prior to the date the amendment came into force, cause of action for the right to file a petition under section 13 would arise from the date of that decree prior to the date of that amendment. Once cause of action had arisen for the right to file a petition prior to the date of amendment in favour of the spouse only, to whom the decree had been granted and the other spouse was under disability to avail of that right, that right became exercisable by that spouse alone, in whose favour the decree was passed. The question that arises is

whether the amendment intervening the continuity of cause of action vesting that right in one spouse and denying it to the other has conferred that right on the spouse, to whom it had been denied prior to amendment. Both the right inhering in one spouse and the corresponding disability, from which the other spouse suffered, having arisen and been entailed prior to the date of amendment and that right being a substantive right with corresponding disability, the amendment could not adversely affect that right or remove corresponding disability unless the amendment is retrospective in operation either by express provision to that effect or the inference of its retrospective effect follows from necessary implication or intendment.

(12) There cannot be any gain saying the proposition and that has also been conceded by the counsel for the husband that right to maintain a petition, whether by the husband or by the wife, and in the present case by the husband, under section 13 of the Act is a substantive right. That substantive right arose out of the decree dated July 9, 1958, when passed in favour of the wife only to the wife and not to the husband as the decree had been passed against him.

(13) There is neither any express provision nor any implied indication in section 13 as amended to show that in its application the amendment is retrospective so as to additionally confer that substantive right on a spouse, who by virtue of the pre-amendment provision stood divested or deprived of it. It is well recognised canon of construction of statute that enforcement of a fresh enactment or of an amendment of an existing law, in so far as a substantive provision is concerned, is prospective in its operation or applicability unless it has been expressly or impliedly provided that fresh enactment or amendment is retrospective in its operation. In case of enforcement of a procedural provision of law, the consequence of its applicability is just the converse. A procedural provision when enforced is retrospective in its operation and governs pending cases unless the legislative authority enacting it has, by express provision or necessary implication, made it prospectively applicable and drawn it out of the clutch of automatic retrospective application.

(14) It is only on the footing of a decree passed on or after December 22, 1964, when sub-section (1-A) of section 13 became operative that a spouse other than the one, in whose favour a decree has been granted for judicial separation, can maintain a petition under

that sub-section. Right to maintain petition had accrued only to the wife under section 13 as it stood prior to the date the amendment came into force and no such right arose to the husband thereunder. On the date of the decree, husband was denied the right to maintain the petition under section 13. Exclusive privilege in the wife to exercise that right vested in her and corresponding denial of that right to the husband ran parallel from the date of the decree up to the date of amendment of sub-section (1-A) of section 13. Sub-section (1-A) has in its scope failed to vest a husband, against whom decree had been passed prior to its enforcement, with the right of maintaining a petition of which he stood divested. Thus the amendment has failed to come to the rescue of the husband and is helpless in enabling him to maintain the present petition. Sub-section (1-A) of section 13 as introduced by the Amendment Act in 1964 could apply to the petition filed by the husband after the date of amendment, if it provided that petition under section 13 after the amendment would be maintainable by a spouse in whose favour no decree had been passed prior to the amendment. The legislature having not made sub-section (1-A) of section 13 of the Act retrospective in its operation by taking within its scope the right to maintain petition denied to a spouse, against whom decree had been passed prior to the date of amendment, the husband has no *locus standi* to present the petition filed by him.

(15) Sub-section (1-A) of section 13 says that either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition for the dissolution of the marriage by a decree of divorce. It has been made retrospective only with reference to the date of marriage. The provision says that it shall apply to cases of all marriages, whether solemnized before or after the commencement of the Act. The provision implies that after amendment either spouse can make a petition, whether married before or after the Act came into force. It means all married persons, who are Hindus, can file a petition. Prior to the amendment, a petition under section 13 in relation to the ground of non-resumption of cohabitation for a period of two years or more after a decree for judicial separation had been passed was maintainable only by the decree holder. In the present case, the wife being the decree holder, she alone can maintain a petition under that section. The provision, however, does not at all say that it shall apply, whether decrees for judicial separation have been passed before or after the amendment. In the absence of any indication to that effect in the amendment as

introduced by sub-section (1-A) of section 13, it cannot be held that it applies to decrees obtained prior to its amendment. In that view of the matter, the husband cannot maintain the petition by virtue of sub-section (1-A) of section 13 on the ground that he was a party to decree for judicial separation obtained by wife against him. Thus, I find that the view taken by the trial Court on the joint discussion of issues Nos. 1 and 2 is not sustainable. I set aside the finding under these two issues and hold that the petition of the husband is not maintainable.

(16) The argument of the counsel for the husband that the view taken by the trial Court on issue No. 4 is erroneous has no force. Clause (a) of sub-section (1) of section 23 of the Act provides that in any proceeding under the Act, whether defended or not, if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief and there is no unnecessary or improbable delay in instituting the proceedings, then and in such a case but not otherwise, the Court shall decree such relief accordingly.

(17) No ground has been made out against the neglectful and cruel conduct of the husband being responsible for desertion of the wife in the wake of his remarriage and the wife having been granted decree for judicial separation because of that desertion. It is the conduct of the husband, which compelled the wife to desert him and led to the decree for judicial separation. The view taken by the trial Court on this issue is fully warranted and does not admit of any doubt. The husband stands condemned for his own misconduct of desertion of his wife. He is disentitled to reap dividend of decree of divorce passed as a result of his own misconduct. No accommodation can be shown to him. He is estopped by his act and conduct from seeking dissolution of marriage. The applicability of section 23(1)(a) of the Act irresistibly follows and so does the consequence of dismissal of the petition filed by the husband under section 13 of the Act.

(18) In the result, the appeal fails and is disallowed. There will, however, be no order as to costs.